R.D. # 0013-02
West New York, NJ

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22

HUDSON BREAD, DIVISION OF PRESTIGE BAKERIES, INC.[1]
Employer

And **CASE 22-RC-12259**

THE BAKERY, CONFECTIONERY, TOBACCO & GRAIN MILLERS INTERNATIONAL UNION, LOCAL NO. 3, AFL-CIO[2]
Petitioner

DECISION AND DIRECTION OF ELECTION

The Petitioner filed a petition under Section 9(c) of the National Labor Relations Act, as amended, seeking to represent a unit of drivers employed by the Employer. The Employer contends that this unit is inappropriate and refused to take a position as to which unit it would consider appropriate. I find, for the reasons described below, that a unit of drivers is appropriate and I will direct an election in such unit.

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this

[1] The name of the Employer appears as amended at the hearing.
[2] The name of the Petitioner appears as amended at the hearing.

proceeding,[3] I find:

1. The hearing officer's rulings are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. [4]

3. The labor organization involved claims to represent certain employees of the Employer.[5]

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act for the reasons described below:[6]

> **All full-time and regular part-time drivers employed by the Employer at its West New York, New Jersey facility, excluding all office clerical employees, production employees, professional employees, guards and supervisors as defined in the Act and all other employees.**

---

[3] A brief filed by the Employer was fully considered. The Petitioner's facsimile transmission of its brief dated September 26, 2002, is rejected as it fails to comport with Section 102.114(g) of the Board's Rules and Regulations, that provides *inter alia*, that briefs are unacceptable if submitted by facsimile transmission.

[4] The Employer is engaged in the wholesale sale and distribution of baked goods at its West New York, New Jersey facility, its only facility involved herein.

[5] The parties stipulated and I find that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

[6] There are approximately 15 employees in the unit.

Position of the Parties

The Petitioner seeks to represent a unit of all full-time and part-time drivers employed by the Employer at its West New York, New Jersey facility, excluding all office clerical employees, production employees, professional employees, guards and supervisors as defined by the Act and all other employees. The Employer asserts that this unit is "inappropriate."[7] The Employer refused to articulate the basis for its asserted position despite repeated requests by the Hearing Officer. Moreover, the Employer refused to take a position as to which unit it considered to be appropriate nor did the Employer offer to provide witnesses to support its contention that the unit sought was inappropriate.

Hearing Procedure

In the above circumstance, the Hearing Officer permitted the Petitioner to develop a record, admittedly predominately based on hearsay evidence, elicited from its non-employee Organizer, Manny Jimenez.[8] It is noted that the Employer, despite being given the opportunity to present witnesses and/or other evidence in support of its assertion that the unit sought by the Petitioner is inappropriate, declined to do so.

Employer's Operations

Based on the testimony of Petitioner's Organizer Jimenez, it appears that the Employer employs approximately 80 production employees who are engaged in the

---

[7] In support of this position, the Employer relies on the Board's decision in *Abdow Corp.*, 271 NLRB 1269 (1984), which I will discuss infra.

[8] The evidence offered by Jimenez was assertedly obtained from drivers employed by the Employer. Jimenez testified that he had occasion to be outside of the Employer's facility and observed "workers coming out." As such it is unclear as to what Jimenez personally observed in addition to what he learned from employees concerning the Employer's operations.

preparation of baked goods for sale to commercial customers, such as restaurants and hotels. In addition, the Employer employs approximately 15 drivers who load trucks and deliver baked goods to the Employer's customers located primarily in New York, New York and Philadelphia, Pennsylvania. It appears that the drivers spend the majority of their work time away from the Employer's facility, located in West New York, New Jersey, delivering baked goods to customers. There is no evidence that the drivers perform any production work nor is there evidence that production employees carry out driving functions.

According to Jimenez, the drivers are paid between $8 and $11 dollars per hour, get paid overtime under unspecified conditions, receive some vacation benefit after a year of service, punch a time clock, are supervised by one individual, wear uniforms and drive step vans. Drivers have staggered starting times beginning from midnight to 7:00 AM. As noted above, there is no evidence that drivers perform production work or that there are any transfers among classifications. Jimenez further testified that drivers do not have work related contact with production employees. The Employer offered no evidence that Jimenez's admittedly hearsay testimony was inaccurate. This record is silent as to the terms and conditions of employment of production employees.

Sufficiency of Record

The Board held in *Bennett Industries, Inc.,* 313 NLRB 1363(1994) that it has a duty to ensure due process for the parties in connection with the conduct of Board proceedings. In this regard, the Board provides parties with the opportunity to present evidence and argue positions concerning relevant issues. However, the Board also has a duty to protect the integrity of its processes against unwarranted burdening of the

record and unnecessary delay. Here, the Employer refused to articulate the basis for its assertion that the facially valid unit sought by the Petitioner is inappropriate. Nor did the Employer, despite given the opportunity, offer to provide witnesses or other evidence in support of its assertion that the unit sought is inappropriate. In these circumstances, I find that the Hearing Officer struck the proper balance between the right to due process and the need for prompt resolution of a question concerning representation. *HeartShare Human Services of New York, Inc.,* 320 NLRB 1 (1995*)*; *Bennett Industries, Inc.,* supra.

In this regard, any contention that the record is insufficient to allow the undersigned to make a unit determination because the evidence is in hearsay form is misplaced. The Board has held that administrative agencies, like the Board, "…ordinarily do not invoke a technical rule of exclusion but admit hearsay evidence and give it such weight as its inherent quality justifies." *Alvin J. Bart and Co*., 236 NLRB 242 (1978). See also *Midland Hilton & Towers*, 324 NLRB 1141 (1997). Moreover, the Board will rely on hearsay evidence if it is "…rationally probative in force and if corroborated by something more than the slightest amount of other evidence." *RJR Communications*, 248 NLRB 920 (1980).

Based upon the above, noting that Jimenez's testimony is unrebutted and that it is based on information directly gleaned from drivers and to some unspecified extent personal observation, I find that the record contains sufficient probative and corroborated evidence which is sufficiently reliable in content to justify the unit finding described below. *Health Acquisition Corp., d/b/a Allen Health Care Services*, 332 NLRB No. 134 (2000); *Mariah, Inc.*, 322 NLRB 586 (1996). I further note that my

ruling here is consistent with the nature and objective of a representation case hearing, which is to adduce evidence on the basis of which the Board may discharge its duties under Section 9 of the Act. As such, it is investigatory in nature and non adversarial.[9]

Unit Determination

The Board, aware of the complex nature of modern industry, has rejected the application of any fixed rule for the unit placement of truckdrivers and has applied a case-by-case analysis in this area. *E. H. Koester Bakery Co., Inc*., 136 NLRB 1006 (1962). In *Marks Oxygen Co*., 147 NLRB 228 (1964), the Board further clarified its *Koester* policy by deciding that when considering the unit placement of drivers, it would take into account other basic policies such as 1] the Petitioner's desire as to the unit is always a relevant consideration and 2] it is not essential that a unit be the most appropriate unit. Finally, in *Mc-Mor-Han Trucking Co*., 166 NLRB 700 (1967), the Board found that the facts there did not reveal such a community of interest between drivers and other employees as would render a proposed drivers unit inappropriate.

In the instant matter, noting that the unit sought is appropriate on its face, as it appears to include all drivers, and that 1] the drivers perform work primarily away from the plant and have no work related contact with production employees, 3] no other labor organization seeks to represent them in a more comprehensive unit and 4] there is no evidence that there is such a community of interest between the drivers and the production employees that would render a proposed drivers unit inappropriate, I find

[9] I note that Section 102.66 of the Board's Rules and Regulations provides, *inter alia*, that in a representation case hearing "The rules of evidence prevailing in courts of law or equity shall not be controlling."

that the unit sought by the Petitioner constitutes a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act. *Mc-Mor-Han Trucking Co*., supra; *Overnight Transportation Co*., 325 NLRB 612 (1998). In making unit determinations, the Board's task is not to determine the most appropriate unit, but simply to determine an appropriate unit. *P.J. Dick Contracting,* 290 NLRB 150 (1988). In so doing, the Board looks "first to the unit sought by the petitioner. If it is appropriate, [the] inquiry ends. If, however, it is inappropriate, the Board will scrutinize the Employer's proposals." *Dezcon, Inc.,* 295 NLRB 109, 111 (1989). As noted above, the Employer has not proposed any alternative unit and, I find, the unit sought by the Petitioner is appropriate for purposes of collective bargaining. In this connection, I reject the Employer reliance on *Adbow Corp*., supra, as dispositive here. Firstly, as noted above, the Board has held that it will determine the unit placement of truckdrivers on a case-by-case basis. In *Adbow*, the Board determined based on the record before it that the employer had established that a broader plantwide unit including drivers was alone appropriate based on the community of interest facts developed there. Unlike *Adbow*, the Employer here refused to take a position as to what is the appropriate unit beyond its mere assertion that the proposed unit was inappropriate. Furthermore, despite the opportunity to do so, the Employer proffered no evidence as to the unit issue in this matter. In this circumstance, reliance on *Adbow* is misplaced as there is no evidence here that such a community of interest exists between the drivers and the production employees that would render the Petitioner's proposed drivers unit inappropriate.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to issue subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who are employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **The Bakery, Confectionery, Tobacco & Grain Millers International Union, Local No. 3, AFL-CIO.**

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses which may be used to

communicate with them. *Excelsior Underwear, Inc.,* 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in NLRB Region 22, Veterans Administration Building, 20 Washington Place, 5th Floor, Newark, New Jersey 07102, on or before October 4, 2002. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by October 11, 2002.

Signed at Newark, New Jersey this 27th day of September 2002.

_____

Gary T. Kendellen, Regional Director
NLRB Region 22
Veterans Administration Building
20 Washington Place, 5th Floor
Newark, New Jersey 07102

393-6068 440-1760-6200 737-7042